

I, Kevin Savage, submit the accompanying document to this Senate Committee

being the same document submitted by me to the ATSI Review in August 2003.

The contents of the document are, in my view, current and relevant regarding the

aspirations of Torres Strait Islanders, for greater decision making control

brought back to the people.

I submit this document, and hope its expressed view be taken as legitimate

information that will contribute to the subject of examination, and its findings,

of this Committee.

In my view, the contents of the document will provide valuable insight

to the aspirations noted above, of Torres Strait Islanders.

I can be contacted on:

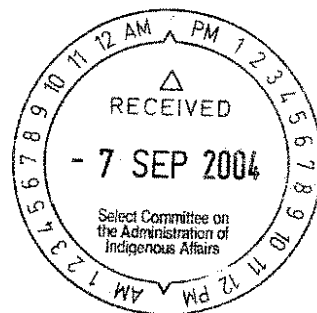
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Background

This submission to the ATSIC Review places a single focus on item 5 of the ANTaR 'Response Kit for the ATSIC Review Public Discussion Paper' under its heading *Key points for submission*. The definitions of self-determination, of human rights and territorial integrity used in this submission are those used in relevant United Nations instruments and international law.

Item 5: "Self-determination principles must underpin ATSIC's structure and roles, including the principle of Indigenous control of policy and programs affecting Indigenous peoples."

In presenting historical data to support this focus, the submission echoes the imperative that all parties are duty bound to observe the directions of the independent umpire (the United Nations) which are written in clear language where the exercise of human rights and self-determination are concerned.

This is especially true if the objective of the ATSIC Review is a genuine and lasting outcome for all stake-holding parties.

Summary

But Australia did not follow the directions of the independent umpire. Instead, from the time that the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples¹ was established, Australia began to operate outside of its guiding principles. It is therefore a concern that Australia continues to be in breach of those guidelines.

However, it is of greater concern that Australia also continues to breach the explicit language of the (15 December 1960) Annex² to General Assembly resolution 1541 (XV) regarding 'Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter.'

This submission points to a valid and practical reconciliation where Australia genuinely rights its past injustices to Torres Strait Islanders and Aboriginal peoples when it denied them their right to self-determine their future. Until Australia returns to the human rights negotiating table and plays by the rules for self-determination, Torres Strait Islanders and Aboriginal peoples will continue to suffer the unnecessarily high levels of disadvantage that has been their lot since colonisation in 1788.

It suggests that the outcome to item 5 (noted above) should be one agreed as being appropriate by Torres Strait Islanders and Aboriginal peoples, as decided by themselves by their own free choice, and that one best representing their interests. This in fact is the due process about which the language of the above-mentioned guidelines makes clear distinction.

¹ General Assembly resolution 1514 (XV) of 14 December 1960, found in its full form in Attachment 1.

² General Assembly resolution 1541 (XV) and its Annex, found in its full form in Attachment 2.

A breach of human rights by Australia since 1960

In the following parts of this submission a selected history is outlined that points to human rights and self-determination. Details of that history reveal Australia's breach of its obligations, when closely examined. And for the purpose of rectifying its breach, it is recommended that Australia returns to the human rights negotiating table and observes the rules.

The prevalent practice of condemning Torres Strait Islanders and Aboriginal peoples for their mistakes is a denigration of their human rights. Especially since those mistakes arise out of a 'capacity-deficit'³ condition imposed on them and not their own choice. But this capacity-deficit condition is the result of Australia denying its responsibility⁴ as a Member of the United Nations.

It is clear that where Torres Strait Islanders and Aboriginal peoples possess inalienable human rights through the United Nations instruments and international law, Australia has corresponding obligations. They are too numerous to mention here but can be found in the following:

- *United Nations conventions and instruments*
 - a) the United Nations Charter - where self-determination is enshrined as a principle and Article 73 of Chapter 11 gives definition to responsibilities for non-self-governing territories
 - b) the International Convention on Civil and Political Rights (CCPR) - ratified by Australia on 13 November 1980
 - c) the International Convention on Economic, Social and Cultural Rights (CESCR) - ratified by Australia on 10 March 1976
 - d) the Declaration on the Granting of Independence to Colonial Countries and Peoples - where the principle of self-determination was upgraded to become an inalienable human right
 - e) the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations - although not binding, this Declaration notes the potential 'other' political arrangements that can be forged between States Parties and their colonised peoples

As a well-informed Member of the United Nations and signatory to human rights conventions, Australia breached its obligations to the 14 December 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples. And the clear precise language employed in the Annex to General Assembly resolution 1541 (XV) puts substance behind the charge (as elaborated in the following examples) of Australia breaching its obligations.

An evidence of that breach is seen in circumstances leading up to (and in the outcomes of) the 1967 Referendum. This is about the implementation by Australia of the third option of legitimate self-government⁵ for Torres Strait Islanders and Aboriginal peoples. It is believed that Australia decided on implementing this option during its term as member of the first Special Committee⁶.

³ For the purposes of this submission, the term 'capacity-deficit' condition is used to describe the general skills deficits of Torres Strait Islanders and Aboriginal peoples since 1960, as a result of Australia denying them their right to legitimately exercise self-determination.

⁴ Obligations for Australia are those indicated by *United Nations conventions and instruments* listed under this heading in this submission.

⁵ Refer to Principle VI of the Annex to General Assembly resolution 1541 (XV), found in Attachment 2

⁶ Its full title is the *Special Committee on the Situation with regard to Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, established on 27 November 1961 by General Assembly resolution 1654 (XVI).

- *General Assembly resolution 1541 (XV) of 15 December 1960, Principle VIII of the Annex*

Principle VIII

Integration with an independent State should be on the basis of complete equality between the peoples of the erstwhile Non-Self-Governing Territory and those of the independent country with which it is integrated. The peoples of both territories should have equal status and rights of citizenship and equal guarantees of fundamental rights and freedoms without any distinction or discrimination; both should have equal rights and opportunities for representation and effective participation at all levels in the executive, legislative and judicial organs of government.

Until the 1967 Referendum, Torres Strait Islanders and Aboriginal peoples were not counted in the census. They existed at the mercy of the States who were responsible for their care and protection. At the same time the Commonwealth did not have the constitutional powers to enact legislation on their behalf. Clearly at that time, governance and administration by the States was failing⁷ in terms of its population management practices for its Indigenous peoples.

This condition of Torres Strait Islanders and Aboriginal peoples from a human rights perspective was obviously embarrassing to Australia, including (and because of) the Declaration and given the fact that Principle VIII of the Annex to General Assembly resolution 1541 (XV), as stipulated above, demanded complete equality.

The 1967 Referendum adjusted this '... distinction or discrimination [against] complete equality...' and gave Australia the freedom to continue implementation of its integration procedures.

But the decision to integrate Torres Strait Islanders and Aboriginal peoples occurred without their knowledge that colonised and dependent peoples could seek assistance from the United Nations to self-determine, by being listed as a Non-Self-Governing Territory with the General Assembly. Had they acted on that opportunity it would have placed them in a far better position to exercise self-determination, than the position they currently occupy.

Due to absence of knowledge about it, and the denial of that opportunity, Torres Strait Islanders and Aboriginal peoples have been forced to contend with the administering Power (Australia) and its 'interests' relevant to its territorial integrity, wherever human rights and self-determination are concerned. History clearly shows what those outcomes have been.

Whether or not Torres Strait Islanders and Aboriginal peoples have the right to be listed with the General Assembly as a non-self-governing territory remains to be seen. Undoubtedly, many in Australia would argue they have no right to be listed. But what cannot be denied is the fact their historical and current position in Australia bears the valid description of a 'colonised and dependent peoples' to which universal human rights and self-determination principles apply.

A curious but interesting fact emerging from the native title judgment handed down by the High Court of Australia⁸ in 1992 is the inadvertent validation that Torres Strait Islanders and

⁷ There is more than sufficient history available about these conditions to warrant its further mention.

⁸ This was the decision where terra nullius as the basis for colonisation was exposed as a myth. It began with application to the courts about land occupied by Torres Strait Islanders. As a result of its exposure, it was extinguished - but the native title legislation came to apply to all Aboriginal peoples and all Australia.

Aboriginal peoples occupy their own lands, over which they have no legitimate form of government. In other words, they occupy non-self-governing territory that is their own. This is a fact that is yet to be contested on the grounds of international law.

What is almost certain is that the conservative political elements in Australia will oppose this definition of non-self-governing territory (if it is contested) as strenuously as they today oppose any real and genuine attempts by Torres Strait Islanders and Aboriginal peoples to exercise their universal right to self-determine. Reliance on external powers by conservative political elements would be anathema to the exercise of their territorial integrity.

- *General Assembly resolution 1541 (XV) of 15 December 1960, Principle IX of the Annex*

Where universal human rights and self-determination are concerned, Torres Strait Islanders and Aboriginal peoples had the right to be informed about the decisions being made for them, where their future is concerned. But a quick check with the Indigenous activists of the 1960's to 1980's indicates this to be otherwise. The facts are many did not know then, and many do not know now, even though the language of the guidelines is clear that their full knowledge is required.

Principle IX

Integration should have come about in the following circumstances:

(a) The integrating territory should have attained an advanced stage of self-government with free political institutions, so that its peoples would have the capacity to make a responsible choice through informed and democratic processes;

(b) The integration should be the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage. The United Nations could, when it deems it necessary, supervise these processes.

The three legitimate forms of self-government

Until this injustice is corrected for Torres Strait Islanders and Aboriginal peoples, attempts by Australia to change the nation's economic, social and political landscape through ATSIC or any other statutory body will fail in one way or another. This is because ATSIC and similar bodies are based on principles of self-management, not of legitimate self-government.

The language of the guidelines⁹ to the third option of legitimate self-government clearly indicates the right that Torres Strait Islanders and Aboriginal peoples have for greater active participation in decision making where their future is concerned, than has been the case for them to date. Consequently, the actions adopted by Australia since 1960 to deal with its Indigenous peoples are illegitimate. Those actions are a replacement, disguised as the real thing.

Until the appropriate environment is established where the rules for universal human rights and self-determination principles can be applied, overseen by the independent umpire if necessary, Australia's dealings with its Indigenous peoples will continue to be illegitimate and therefore invalid by standards of international law.

⁹ Principle IX of the Annex to General Assembly resolution 1541 (XV), 15 December 1960.

The three legitimate forms of self-government endorsed by the United Nations and upheld by international law, General Assembly resolution 1541 (XV), are the following.

- *General Assembly resolution 1541 (XV) of 15 December 1960, Principle VI of the Annex*

Principle VI

A Non-Self-Governing Territory can be said to have reached a full measure of self-government by:

- (a) Emergence as a sovereign independent State;
- (b) Free association with an independent State; or
- (c) Integration with an independent State.

A possible solution for self-determination

Whether the body emerging from this government-initiated Review is to be ATSIC or some other representative organisation, Aboriginal peoples and Torres Strait Islanders still have the real opportunity to self-determine their future. A key reason for this is due to the Special Committee establishing 1990-2000 as the International Decade for the Eradication of Colonialism¹⁰.

The intent by the General Assembly of this international decade was to usher in the 21st century a world free of colonialism (and its attendant evils) - it did not happen.

In that decade Australia established the Council for Aboriginal Reconciliation and the Aboriginal and Torres Strait Islander Commission (ATSIC). The Council was responsible for implementing national reconciliation and was recently wound up while the Commission has been struggling for survival and is under threat of being wound up. The lifetime of these two organisations are seen as specifically relevant to the 'defining period' of the international decade.

But the Special Committee was so concerned about the failure to usher in the 21st century a world free of colonialism that it established the Second International Decade for the Eradication of Colonialism 2001-2010¹¹. In this second international decade a further focus is placed on Member States to observe their obligations to the United Nations instruments and international law where their colonised and dependent peoples are concerned.

It is in this remaining seven years of the second international decade that Torres Strait Islanders and Aboriginal peoples could formally ask the United Nations to act as the independent umpire and assist them in their right to self-determine. There may not be a third international decade.

The time that Torres Strait Islanders and Aboriginal peoples choose legitimate self-government in full knowledge and by their freely expressed wishes is when self-determination principles will truly underpin ATSIC or other 'political arrangement'. And only when Indigenous peoples attain to their chosen position will principles of Indigenous control of policy and programs be evident.

Until that time comes around, Australia will continue to exercise its territorial integrity and will continue to retain the upper hand. And in the meantime it will continue to breach its obligations to Torres Strait Islanders and Aboriginal peoples – but that truly is an unacceptable outcome.

¹⁰ General Assembly resolution 43/47 of 22 November 1988.

¹¹ General Assembly resolution 55/146 of 08 December 1990.



United Nations

General Assembly

Fifteenth session

RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY

1514 (XV) Declaration on the granting of independence to colonial countries and peoples

The General Assembly,

Mindful of the determination proclaimed by the peoples of the world in the Charter of the United Nations to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small and to promote social progress and better standards of life in larger freedom,

Conscious of the need for the creation of conditions of stability and well-being and peaceful and friendly relations based on respect for the principles of equal rights and self-determination of all peoples, and of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Recognizing the passionate yearning for freedom in all dependent peoples and the decisive role of such peoples in the attainment of their independence,

Aware of the increasing conflicts resulting from the denial of or impediments in the way of the freedom of such peoples, which constitute a serious threat to world peace,

Considering the important role of the United Nations in assisting the movement for independence in Trust and Non-Self-Governing Territories,

Recognizing that the peoples of the world ardently desire the end of colonialism in all its manifestations,

Convinced that the continued existence of colonialism prevents the development of international economic cooperation, impedes the social, cultural and economic development of dependent peoples and militates against the United Nations ideal of universal peace,

Affirming that peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law,

Believing that the process of liberation is irresistible and irreversible and that, in order to avoid serious crises, an end must be put to colonialism and all practices of segregation and discrimination associated therewith,

Welcoming the emergence in recent years of a large number of dependent territories into freedom and independence, and recognizing the increasingly powerful trends towards freedom in such territories which have not yet attained independence,

Convinced that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory,

Solemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations;

And to this end

Declares that:

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.
2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.
4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.
5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.
6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.
7. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.

*947th plenary meeting,
14 December 1960.*



United Nations

Resolutions adopted on the reports of the Fourth Committee

1541 (XV). Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter

The General Assembly,

Considering the objectives set forth in Chapter XI of the Charter of the United Nations,

Bearing in mind the list of factors annexed to General Assembly resolution 742 (VIII) of 27 November 1953,

Having examined the report of the Special Committee of Six on the Transmission of Information under Article 73 e of the Charter,¹² appointed under General Assembly resolution 1467 (XIV) of 12 December 1959 to study the principles which should guide Members in determining whether or not an obligation exists to transmit the information called for in Article 73 e of the Charter and to report on the results of its study to the Assembly at its fifteenth session,

1. Expresses its appreciation of the work of the Special Committee of Six on the Transmission of Information under Article 73 e of the Charter;

2. Approves the principles set out in section V, part B, of the report of the Committee, as amended and as they appear in the annex to the present resolution;

3. Decides that these principles should be applied in the light of the facts and the circumstances of each case to determine whether or not an obligation exists to transmit information under Article 73 e of the Charter.

*948th plenary meeting,
15 December 1960.*

ANNEX

PRINCIPLES WHICH SHOULD GUIDE MEMBERS IN DETERMINING WHETHER OR NOT AN OBLIGATION EXISTS TO TRANSMIT THE INFORMATION CALLED FOR IN ARTICLE 73 E OF THE CHARTER OF THE UNITED NATIONS.

Principle I

The authors of the Charter of the United Nations had in mind that Chapter XI should be applicable to territories which were then known to be of the colonial type. An obligation exists to transmit information under Article 73 e of the Charter in respect of such territories whose peoples have not yet attained a full measure of self-government.

¹² *Ibid*, agenda item 38, document A/4526

Principle II

Chapter XI of the Charter embodies the concept of Non-Self-Governing Territories in a dynamic state of evolution and progress towards a "full measure of self-government". As soon as a territory and its peoples attain a full measure of self-government, the obligation ceases. Until this comes about, the obligation to transmit information under Article 73 e continues.

Principle III

The obligation to transmit information under Article 73 e of the Charter constitutes an international obligation and should be carried out with due regard to the fulfilment of international law.

Principle IV

Prima facie there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.

Principle V

Once it has been established that such a *prima facie* case of geographical and ethnical or cultural distinctness of a territory exists, other elements may then be brought into consideration. These additional elements may be, *inter alia*, of an administrative, political, juridical, economic or historical nature. If they affect the relationship between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position or status of subordination, they support the presumption that there is an obligation to transmit information under Article 73 e of the Charter.

Principle VI

A Non-Self-Governing Territory can be said to have reached a full measure of self-government by:

- (a) Emergence as a sovereign independent State;
- (b) Free association with an independent State; or
- (c) Integration with an independent State.

Principle VII

(a) Free association should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes. It should be one which respects the individuality and the cultural characteristics of the territory and its peoples, and retains for the peoples of the territory which is associated with an independent State the freedom to modify the status of that territory through the expression of their will by democratic means and through constitutional processes.

(b) The associated territory should have the right to determine its internal constitution without outside interference, in accordance with due constitutional processes and the freely expressed wishes of the people. This does not preclude consultations as appropriate or necessary under the terms of the free association agreed upon.

Principle VIII

Integration with an independent State should be on the basis of complete equality between the peoples of the erstwhile Non-Self-Governing Territory and those of the independent country with which it is integrated. The peoples of both territories should have equal status and rights of citizenship and equal guarantees of fundamental rights and freedoms without any distinction or discrimination; both should have equal rights and opportunities for representation and effective participation at all levels in the executive, legislative and judicial organs of government.

Principle IX

Integration should have come about in the following circumstances:

(a) The integrating territory should have attained an advanced stage of self-government with free political institutions, so that its peoples would have the capacity to make a responsible choice through informed and democratic processes;

(b) The integration should be the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage. The United Nations could, when it deems it necessary, supervise these processes.

Principle X

The transmission of information in respect of Non-Self-Governing Territories under Article 73 e of the Charter is subject to such limitation as security and constitutional considerations may require. This means that the extent of the information may be limited in certain circumstances, but the limitation in Article 73 c cannot relieve a Member State of the obligations of Chapter XI. The "limitation" can relate only to the quantum of information of economic, social and educational nature to be transmitted.

Principle XI

The only constitutional considerations to which Article 73 e of the Charter refers are those arising from constitutional relations of the territory with the Administering Member. They refer to a situation in which the constitution of the territory gives it self-government in economic, social and educational matters through freely elected institutions. Nevertheless, the responsibility for transmitting information under Article 73 e continues, unless these constitutional relations preclude the Government or parliament of the Administering Member from receiving statistical and other information of a technical nature relating to economic, social and educational conditions in the territory.

Principle XII

Security considerations have not been invoked in the past. Only in very exceptional circumstances can information on economic, social and educational conditions have any security aspect. In other circumstances, therefore, there should be no necessity to limit the transmission of information on security grounds.